

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR 23 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

|                       |   |                            |
|-----------------------|---|----------------------------|
| THE STATE OF ARIZONA, | ) | 2 CA-CR 2009-0323-PR       |
|                       | ) | DEPARTMENT A               |
| Respondent,           | ) |                            |
|                       | ) | <u>MEMORANDUM DECISION</u> |
| v.                    | ) | Not for Publication        |
|                       | ) | Rule 111, Rules of         |
| FRANKLYN EDWARD CAIN, | ) | the Supreme Court          |
|                       | ) |                            |
| Petitioner.           | ) |                            |
| _____                 | ) |                            |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-20080276 and CR-20080451

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

Law Offices of Erin E. Duffy, P.L.L.C.  
By Erin E. Duffy

Tucson  
Attorney for Petitioner

H O W A R D, Chief Judge.

¶1 Pursuant to a plea agreement, petitioner Franklyn Cain pled guilty to four counts of second-degree child molestation. The trial court sentenced him to presumptive, consecutive terms of imprisonment totaling twenty years on two of the counts; suspended the imposition of sentence on the remaining counts; and ordered him placed on lifetime

probation following his release. Cain sought relief from the trial court pursuant to Rule 32, Ariz. R. Crim. P., raising a claim of ineffective assistance of counsel and also claiming the trial court had incorrectly determined he was not entitled to presentence incarceration credit. The court found Cain had been entitled to 207 days' presentence incarceration credit and granted relief on that claim. But the court denied the portion of Cain's petition for post-conviction relief raising grounds of ineffective assistance of counsel. This petition for review followed.

¶2 In his petition for review, Cain contends the trial court erred in denying his claim of ineffective assistance of counsel, claiming his trial attorney was ineffective at sentencing because he "disclosed . . . a psycho-sexual evaluation that painted [Cain] in a very negative light." We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of the court's discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶3 As a preliminary matter, we note that the psychosexual evaluation is not part of the record available to us on review.<sup>1</sup> It is Cain's responsibility to ensure that the record "contains the material to which he takes exception," *State v. Wilson*, 179 Ariz. 17,

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<sup>1</sup>Cain's references to the evaluation in his petition for review are not to the evaluation itself but to an exhibit to his petition below containing a discussion of the evaluation in the trial court's sentencing transcript. In his petition for post-conviction relief, Cain also stated:

Due to the sensitive nature of [the evaluation] and privacy concerns[,] undersigned counsel is not attaching the report as an exhibit but would ask the Court to refer to the copy provided to the Court at the time of sentencing and incorporate that report as part of the record for these proceedings.

n.1, 875 P.2d 1322, 1324 n.1 (App. 1993), and missing parts of the record are generally presumed to support the trial court's ruling, *see State v. Printz*, 125 Ariz. 300, 304, 609 P.2d 570, 574 (1980).

¶4 In any event, Cain acknowledges his attorney introduced the evaluation for mitigation purposes. Given this characterization of the contents of the evaluation, we cannot conclude the trial court erred in determining its presentation did not constitute ineffective assistance of counsel. To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below prevailing professional norms and also that the outcome of the case would have been different but for the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). "To avoid summary dismissal and achieve an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel," a petitioner must present a colorable claim on both parts of the *Strickland* test. *State v. Fillmore*, 187 Ariz. 174, 180, 927 P.2d 1303, 1309 (App. 1996); *see also* Ariz. R. Crim. P. 32.6(c) (summary dismissal appropriate unless "material issue of fact or law which would entitle the defendant to relief" exists), 32.8(a) (defendant entitled to hearing if material issue of fact remains). A colorable claim is "one that, if the allegations are true, might have changed the outcome." *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶5 Reviewing courts indulge "a strong presumption" that counsel provided effective assistance. *Strickland*, 466 U.S. at 689; *State v. Hershberger*, 180 Ariz. 495, 497, 885 P.2d 183, 185 (App. 1994). And "[m]atters of trial strategy and tactics are

committed to defense counsel's judgment.” *State v. Beaty*, 158 Ariz. 232, 250, 762 P.2d 519, 537 (1988); accord *State v. Espinosa-Gamez*, 139 Ariz. 415, 421, 678 P.2d 1379, 1385 (1984) (“Actions which appear to be a choice of trial tactics will not support an allegation of ineffective assistance of counsel.”). Even if counsel's strategy proves unsuccessful, tactical decisions normally will not constitute ineffective assistance of counsel, *State v. Farni*, 112 Ariz. 132, 133, 539 P.2d 889, 890 (1975), ““disagreements [over] trial strategy will not support a claim of ineffective assistance of counsel, provided the challenged conduct had some reasoned basis,”” *State v. Vickers*, 180 Ariz. 521, 526, 885 P.2d 1086, 1091 (1994), quoting *State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987).

¶6 Cain's trial attorney's decision to present the psychosexual evaluation was a tactical and strategic trial decision with a reasonable basis—to demonstrate certain factors the court might use to mitigate Cain's sentence. Cain's attorney noted at sentencing that, although portions of the evaluation were negative, it was nevertheless useful to demonstrate mitigating factors such as Cain's “intellectual deficits” and mental illness. And Cain does not challenge this characterization; he simply argues his trial attorney should not have presented the evaluation, and was therefore ineffective, because the evaluation contained negative material. Cain has failed to present a colorable claim of ineffective assistance of counsel.

¶7 Furthermore, in denying post-conviction relief, the trial court noted, based upon factors other than the report, that “any sentence less than that Petitioner received would have been inappropriate.” Accordingly, Cain has failed to show prejudice.

¶8 The trial court did not abuse its discretion in denying the petition for post-conviction relief. Although we grant Cain’s petition for review, we deny relief.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge